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June 16, 2008

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 07-97, Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas

Dear Ms. Dortch:

The undersigned companies, through their attorneys, hereby respond to the May 15, 2008 Qwest Corporation ("Qwest") *ex parte* letter in the above-captioned proceeding.[1] In that submission, Qwest attempts to rebut evidence and analysis presented by the undersigned companies, and other interested parties, which prove Qwest has not met the statutory criteria for forbearance from Section 251(c)(3) unbundling obligations in the Denver, Minneapolis-St. Paul, Phoenix, or Seattle Metropolitan Statistical Areas ("MSAs"). As shown below, Qwest's efforts to discredit the substantial record evidence supplied by others fall far short of the mark.

I. THE CURRENT SECTION 251(c)(3) FORBEARANCE STANDARD MUST BE APPLIED IN A THOROUGH AND CONSISTENT MANNER

Qwest contends that the undersigned companies have "propose[d] multiple changes to the Commission's unbundling forbearance analysis" and urges the Commission to reject those proposals.[2] The alleged proposed changes to the Section 251(c)(3) forbearance

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1 Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed May 15, 2008) ("*Qwest May 15th Ex Parte*").

2 *Qwest May 15th Ex Parte*, at 5.

framework identified by Qwest fall into three categories: (1) defining product markets; (2) requiring the presence of more than one facilities-based competitor to guard against the development of an ILEC/cable duopoly; and (3) reviewing market penetration at the wire center level.[3] Qwest's characterization of these factors as outside the scope of the analysis conducted by the Commission in previous Section 251(c)(3) forbearance proceedings is incorrect. The undersigned carriers are not suggesting that the Commission adopt a new or modified forbearance standard here. Rather, they are merely urging the Commission to apply the current standard in a complete and consistent manner.

With respect to identifying relevant product markets and separately analyzing competitive market conditions within each product market, Qwest itself has conceded it is necessary for the Commission to do so. Indeed, each of Qwest's four petitions presents its case for Section 251(c)(3) forbearance separately for the mass market and the enterprise market – the two product markets Qwest believes are relevant to the discussion – and the very limited (and incomplete) "evidence" of competitive market activity proffered by Qwest is presented on a product market-specific basis.[4] It is therefore completely disingenuous (and incorrect) for Qwest to now contend that product markets are not relevant to the Commission's Section 251(c)(3) forbearance determinations.[5]

Qwest's contention that the undersigned parties have "ask[ed] the Commission to change its standard"[6] to incorporate an analysis of the duopoly issue (and to require the presence of at least two facilities-based competitors) likewise misrepresents prior forbearance precedent.

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3 *Id.*, at 5-6.

4 The undersigned carriers maintain that the Commission also must consider the nature and extent of competitive activity in the broadband product market and the wholesale product market. Moreover, as detailed by the undersigned carriers in previous submissions, the market share data Qwest has submitted for the mass market and the enterprise market is incomplete and, in any case, fails to prove that Qwest faces successful facilities-based competition in either product market in any of the four MSAs at issue. *See, e.g.*, Letter from Brad Mutschelknaus, Counsel to Covad Communications Group, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 24, 2008) ("*CLEC April 24th Ex Parte*"), at 10-11.

5 If the Commission were to adopt Qwest's position (which it should not), it would be required to include *all mass market (i.e., residential and small business)* and *all enterprise* lines in its assessment of the aggregate level of facilities-based competitive market penetration in each of the four MSAs at issue. Qwest has failed to provide any estimate of the overall (*i.e.*, combined enterprise and mass market) market share of facilities-based competitors in the Denver, Minneapolis-St. Paul, Phoenix, or Seattle MSA.

6 *Qwest May 15th Ex Parte*, at 6.

Qwest ignores the detailed discussion in the *Omaha Forbearance Order*[7] of the duopoly question. There, the Commission addressed concerns that forbearing from application of unbundling requirements to Qwest would result in a ILEC/cable duopoly and concluded that "the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under Sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct" in the Omaha MSA.[8] The Commission predicted that, in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding the development of a Qwest/Cox duopoly.[9]

Here, interested parties have shown the Commission that its predictive judgment that Qwest would continue to make wholesale offerings to competitors on reasonable rates and terms has turned out to be incorrect.[10] Thus, consistent with its prior logic and analysis, the Commission must require the existence of at least two facilities-based carriers in a particular market in order to ensure that a duopoly situation does not result if forbearance from unbundling obligations is granted.

Finally, Qwest contends that the Commission's forbearance analysis need not include any assessment of the level of competitive market penetration in particular wire centers and that to do so would constitute a deviation from the *Omaha Forbearance Order* standard.[11] This contention is ridiculous. In the *Omaha Forbearance Order*, the Commission held:

> The merits of [Qwest's] Petition warrant forbearance only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a). We are persuaded by record evidence, some

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7 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir. Mar. 23, 2007).

8 *Omaha Forbearance Order*, at ¶ 71.

9 *Id.*, at ¶ 67.

10 *See, e.g., In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) ("*McLeodUSA Petition*").

11 *Qwest May 15th Ex Parte*, at 6.

> of which Qwest and Cox submitted on a wire center basis, *that such a level of competition exists in certain of Qwest's wire center service areas located in the Omaha MSA. We are equally convinced that in other wire center service areas in this market, Qwest is not subject to this level of competition.*[12]

The Commission confirmed use of this standard in the *Anchorage Forbearance Order*, where it:

> granted ACS relief from section 251(c)(3) unbundling obligations and section 252(d)(1) pricing obligations in the five of the 11 wire centers in the Anchorage study area where it found that the level of facilities-based competition by GCI ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary.[13]

As the language cited above indicates, the Commission granted Qwest and ACS forbearance from Section 251(c)(3) unbundling obligations only for those wire centers where "sufficient facilities-based competition" was found to exist. Thus, the level of competitive market penetration in particular wire centers was (and is) integral to the Commission's Section 251(c)(3) forbearance determinations.[14]

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12 *Omaha Forbearance Order*, at ¶ 61 (footnote omitted, emphasis supplied).

13 *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c), for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, WC Docket No. 06-109 (rel. Aug. 20, 2007), at ¶ 14.

14 According to Qwest, EarthLink disagrees that an assessment of competitive activity on a wire center-specific basis is "desirable." *Qwest May 15th Ex Parte*, at 6. Qwest misconstrues EarthLink's position. In the *ex parte* letter cited by Qwest, EarthLink merely correctly notes that market share gains by competitors in particular individual wire centers within an MSA should not be used as justification for the conclusion that sufficient competition exists in the MSA as a whole to warrant forbearance. Letter from John Nakahata, Counsel to EarthLink, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 15, 2008), at 4.

II. THE GEORESULTS DATA ACCURATELY IDENTIFIES THE EXTENT OF FACILITIES-BASED COMPETITION IN THE ENTERPRISE MARKET

In its *May 15th Ex Parte*, Qwest identifies several alleged shortcomings of the GeoResults data submitted by interested parties showing the number of commercial buildings served by competitive carriers in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.[15] Qwest's representations are inaccurate and misleading and fail to identify any legitimate reason why the GeoResults data should not be used to assess the nature and extent of facilities-based enterprise market competition in the MSAs at issue.

First, Qwest contends that the GeoResults data "reflects only a subset of the market," since it "excludes commercial buildings served by dark fiber, traditional copper cable, coaxial cable, fixed wireless broadband services, and other technologies."[16] Qwest is incorrect. The GeoResults spreadsheets include all commercial buildings to which one or more competitive carriers have deployed network terminating equipment regardless if such network terminating equipment is connected to the competitive carrier's network by copper cable, fiber, coaxial cable, or wireless facilities. For example, commercial buildings served by carriers that lease dark fiber and then place network terminating equipment at the ends of the dark fiber facilities appear on the GeoResults reports. Likewise, commercial buildings served by carriers that place multiplexors at the end of a copper loop appear in the GeoResults reports. In other words, the GeoResults spreadsheets capture commercial buildings based on the presence of network terminating equipment, not based on the nature of the network facility connected to that network terminating equipment.

Qwest also contends that the GeoResults data is "misleading" because it "ignores any commercial buildings within a reasonable distance, such as 1,000 feet, of a competitive fiber route."[17] Qwest is correct that the GeoResults spreadsheets identify only those commercial buildings where at least one competitive carrier is currently providing service. That is as it should be, however, since the Commission's responsibility is to determine whether sufficient *actual* enterprise market competition exists to justify forbearance. Nonetheless, the undersigned carriers understand that the issue of whether a particular facilities-based carrier can economically build a lateral to serve currently-unserved commercial buildings in an MSA has been raised by Qwest in this proceeding. Although GeoResults does not have access to the type of information necessary to conduct an "addressable market" study for the competitive industry as a whole, at least one individual carrier, XO Communications, LLC, has undertaken this analysis and filed its

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15 *Qwest May 15th Ex Parte*, at 7-9.

16 *Id.*, at 7 (footnote and emphasis omitted). Qwest does not cite any authority for this conclusion.

17 *Id.*

results with the Commission.[18] The XO analysis shows the maximum theoretical reach of XO's network and supports the conclusions drawn from the industry-wide GeoResults data that facilities-based competitors serve an extremely small percentage of commercial buildings in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.

Qwest argues further that "alternatives to direct fiber feeds are readily available to serve commercial buildings."[19] Qwest suggests that fixed wireless services, such as those provided by NextLink, which are "direct alternatives to Qwest's wholesale and loop and transport services," are available on a wholesale and a retail basis in the four MSAs at issue and Qwest criticizes the GeoResults data for not including commercial buildings served by NextLink.[20] Qwest is wrong. In fact, NextLink's fixed wireless network terminating equipment *is* included in the spreadsheets obtained from GeoResults. Thus, the limited use by enterprise customers of NextLink's fixed wireless alternative is reflected in the commercial building data that has been made part of the record in this proceeding.

More generally, Qwest does not provide any data purporting to show the number of commercial buildings that currently are served via fixed wireless services, nor does it attempt to quantify the number of commercial buildings that may be served in this manner within a commercially reasonable period of time. That is not surprising in light of the fact that overall fixed wireless technologies do not currently represent a viable alternative to wireline transport or last-mile facilities. To that end, just two months ago, the Commission granted a nearly four year extension of the construction requirement for 678 licenses in the Local Multipoint Distribution Service ("LMDS").[21] The Commission allocated 1,300 megahertz of LMDS spectrum in 1997 for wireless local loop applications. At the end of a ten-year term from the initial license grant date, LMDS licensees are required to demonstrate to the Commission that they are providing "substantial service" in each licensed area.[22] The significant extensions of the "substantial

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18 *See* Letter from Genevieve Morelli, Counsel to XO Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed May 20, 2008).

19 *Qwest May 15th Ex Parte*, at 8.

20 *Id.* The support for this representation consists of a single cite to a marketing statement from NextLink's website. *Id.*, at 8-9.

21 *In the Matter of Applications Filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service*, Memorandum Opinion and Order, DA 08-54 (rel. Apr. 11, 2008) ("*LMDS Extension Order*").

22 *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, *Second Report and Order, Order on*

service" requirement granted by the Commission in April reflect the licensees' showing that they cannot economically build out their planned LMDS systems prior to the 2008 and 2009 construction deadlines. As stated in the LMDS Coalition waiver request, "unexpectedly high equipment costs, driven in large part by technical restraints and unfavorable propagation characteristics, [have] prevented LMDS from emerging as a viable competitor to either the local telephone exchange or cable television businesses."[23]

The difficulties inherent in deploying fixed wireless technologies, coupled with the serious operational concerns they represent, have prevented any fixed wireless services from becoming a generally-available substitute for incumbent local exchange carrier ("ILEC") network facilities today.[24] The Economics and Technology, Inc. ("ETI") White Paper filed in the Commission's special access reform docket last August confirms this fact. ETI notes that since its inception, [fixed wireless] technology has been bogged down with operational troubles . . . Due to these problems, fixed wireless has remained a marginal technology for serving the needs of enterprise customers."[25] ETI points out that current deployment in the enterprise market is minimal – a little over 25,000 lines across the country – and concludes that "even if one were (unrealistically) to assume that all of those fixed wireless lines were being used as substitutes for ILEC special access, they would account for *two one-hundredths of one percent*" of the special access market in the United States.[26] Similarly, as of June 2007, the wireless backhaul services offered by FiberTower Corporation ("FiberTower") – a leading provider of alternative wireless backhaul services – accounted for less than one percent of the total market for wireless backhaul services and it has taken five years to reach this level.[27]

Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 125445, 12658 (1997).

23 *LMDS Extension Order*, at ¶ 6, quoting LMDS Coalition Waiver Request at 5.

24 *See, e.g., Comments of XO Communications, LLC, et al.,* WC Docket No. 05-25, Declaration of Ajay Govil, at ¶ 21 (filed Aug. 8, 2007).

25 *Comments of the Ad Hoc Telecommunications Users Committee,* WC Docket No. 05-25, ETI White Paper, at 23-24 (filed Aug. 8, 2007).

26 *Id.*, at 24 (emphasis in original).

27 *See Reply Comments of XO Communications, LLC, et al.,* WC Docket No. 05-25, Second Declaration of Ajay Govil, at ¶ 5 (filed Aug. 15, 2007). FiberTower uses common carrier spectrum as well as its 24 GHz and 39 GHZ licenses to provide its wireless backhaul services.

III. CUT-THE-CORD WIRELESS LINES SHOULD NOT BE INCLUDED IN THE COMMISSION'S ANALYSIS OF COMPETITIVE ACTIVITY

Qwest contends that there is agreement "that there is some substitution of wireless for wireline service, and that the National Health Interview Survey ("NHIS") is a reasonable source for such 'cut-the-cord' estimates."[28] Qwest misrepresents the undersigned parties' position. The undersigned parties maintain that the Commission should exclude all cut-the-cord wireless lines from its analysis of competitive activity in the four MSAs at issue.[29] This position is consistent with the recent paper by Kent W. Mikkelsen, which confirms that there is little basis for including mobile wireless services in the wireline services product market for purposes of assessing competition.[30]

Should the Commission choose to ignore this recommendation, however, it must limit the inclusion of cut-the-cord wireless lines to the residential voice market. Indeed, Qwest itself does not contend that cut-the-cord wireless lines should be included in the calculation of competitive market activity for small businesses or enterprise customers. Moreover, the Commission must ensure that the data it utilizes is the most reliable data available and is interpreted in the most reasonable manner. The undersigned parties maintain that to the extent the Commission considers cut-the-cord wireless data and the Commission chooses a neutral survey such as the National Center for Health Statistics Survey ("NCHS Survey") as its data source, such a survey must be interpreted and refined in the manner outlined in the recent Gillan Associates paper[31] to ensure that the most accurate evaluation of cut-the-cord wireless usage is employed by the Commission.

IV. CONCLUSION

As shown above, Qwest's efforts to discredit the substantial record evidence supplied by others fall far short of the mark. The evidence and analysis before the Commission

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28 *Qwest May 15th Ex Parte*, at 2-3.

29 *See, e.g., CLEC April 24th Ex Parte*, at 14-16.

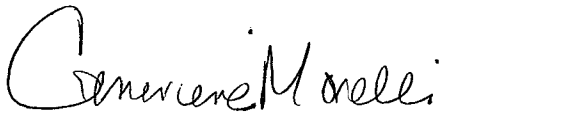
30 *See* Kent W. Mikkelsen, *Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition* (Apr. 2008) ("*Mikkelsen Wireless Paper*"), appended to Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 22, 2008).

31 *See* Gillan Associates, *Properly Estimating the Size of the Wireless-Only Market* (Mar. 2008) ("*Gillan Wireless Paper*"), appended to Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 22, 2008).

prove that Qwest has not met the statutory criteria for forbearance from Section 251(c)(3) unbundling obligations in the Denver, Minneapolis-St. Paul, Phoenix, or Seattle MSAs.

Respectfully submitted,

COVAD COMMUNICATIONS GROUP
NUVOX
XO COMMUNICATIONS, LLC

By: 

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